

AMENDMENTS TO THE DRAWINGS

The attached sheets of drawings include changes to Figs. 3, 4B, 5 and 6. These replacement sheets, which include Figs. 3, 4A, 4B, 5 and 6 replace the original sheets including Figs. 3, 4A, 4B, 5 and 6. No marked up copy is submitted; however, Applicant summarizes the changes in the Remarks below as permitted by 37 CFR 1.121(d).

REMARKS/ARGUMENTS

I. INTRODUCTION

Applicants submit this amendment in response to the Office Action dated October 9, 2007. Claims 1-23 currently remain pending in the present application. By the amendments presented, claims 1, 9, 10 and 22 have been amended. None of these amendments add new matter to the claims. Applicant has added language to claims 1, 9, 10 and 22 that recites that the spa cavity is placed adjacent a partially or fully in-ground pool structure. This language is found in *ipsis verbim* at Paragraph [0020] in the published version of the present application. These claims have further been amended to recite that the spillway allows water to flow from the spa assembly into the pool. This new limitation finds support at Paragraph [0034]. Claim 1 has also been amended to include the language originally set forth in claim 2. Claim 2 has been canceled and claim 3 has been amended to change dependency to amended claim 1. Similarly, claim 9 has been amended to include language originally set forth in claim 15. Claim 15 has been cancelled.

The Examiner has made objections to the drawings in Fig. 3 as missing a legend and Fig. 4B because of the alleged inaccuracy of the cross-hatching. The Examiner has also rejected the claims 1-23 for lack of written description as to the disposition of the flange in a plane substantially above a horizontal plane of the pool surface. Further, the Examiner has rejected the claims as indefinite because of the introduction of the limitation "pool."

With respect to the prior art, the Examiner has rejected pending Claims 1, 4-7, 9 and 17-19 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 3,482,863 ("DeVane"). Claims 1, 4-7, 9-13 and 17-19 are rejected under 35 U.S.C. § 102(b) as being anticipated by "Badon," U.S. Patent No. 4,238,859. Claims 1,4-14 and 17-21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Pat. No. 4,142,337 to Holcomb and U.S. Patent No. 5,727,264 to Craig et al. Finally, claims 2, 3, 15, 16, 22, and 23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Holcomb and Craig and in further view of U.S. Patent No. 4,090,266 to Price. Applicant notes that many of these are the same rejections made previously in the March 13, 2006, and October 3, 2006 Office Actions.

Claim	§112, ¶1	§112, ¶2	§102(b) Devane	§102(b) Badon	§103(a) Holcomb/Craig	§103(a) Holcomb/Craig/ Price
1	X	X	X	X	X	
2	X					X
3	X					X
4	X		X	X	X	
5	X		X	X	X	
6	X		X	X	X	
7	X		X	X	X	
8	X				X	
9	X	X	X	X	X	
10	X			X	X	
11	X			X	X	
12	X			X	X	
13	X			X	X	
14	X	X			X	
15	X					X
16	X					X
17	X		X	X	X	
18	X		X	X	X	
19	X		X	X		
20	X				X	
21	X				X	
22	X	X				X
23	X					X

II. OBJECTIONS TO DRAWINGS

Applicant submits herewith corrected drawing sheets for Fig. 3 and 4B in accordance with the Examiner's objections.

The Examiner has rejected the claims under Rule 83(a) on the basis that all limitations in the claims must be shown in the drawings. Applicant submits herewith revisions to Figs. 5 and 6 that show that the gunite spa cavity is placed adjacent to the in-ground pool to conform with language in Paragraph [0020]. Moreover, further revisions to Figs. 5 and 6 clearly demonstrate that the spillway causes the spa water to flow into the pool by action of gravity in that the top surface of the spa is above the surface of the water in the pool, causing water to flow downward from the spa through the spillway and into the pool. These revisions are supported by the original description at, for example, Paragraphs [0008], [0020], and [0034]. Applicant submits that these revisions do not introduce new matter into the application. Further, these revisions overcome any objections to the drawings under Rule 83(a). Applicant respectfully requests that the objections to the drawings be removed in their entirety.

III. WRITTEN DESCRIPTION REJECTION

Claims 1-23 were rejected under 35 U.S.C. §112, para. 1., as containing subject matter which was not described in the specification in such a way to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. Applicant respectfully traverses, and respectfully submits that this rejection is overcome by the arguments presented below. Applicant notes that the language originally rejected has been modified to improve the precision of the claim language.

All references are to the published version of this application, US 2005/0198731 A1. The present invention is described throughout the specification as spa/hot tub assemblies that insert into a pre-formed cavity to form an integrated pool/spa structure. [0001] The spa insert is designed to fit into the gunite or concrete spa cavity of a new or existing in-ground pool. [0008] Thus, the specification throughout refers to the spa as adjacent to and integrated with an in-ground pool. The spa insert is described as having a spillway that “allows water to flow between the pool and the spa in the same fashion as a traditional gunite packaged pool/spa system. [0008] The relationship of the spa to the pool is such that water from the spa spills over into the pool. [0002] In order for this spillover or flow to occur, the spa water level must be higher than the pool water level. Thus, the claim limitation that the flange with the spillway be physically located above the surface of the pool when filled is implicit in the design, and a natural result of gravity. This does not constitute new matter since one of ordinary skill in the art would know that the

relationship between the spa and the pool is such that the spa water level is above the pool water level. See, e.g. [0020 – “The completed packaged pool system comprises the pool and the adjacent spa, which is arranged so that some of the water from the spa intermingles with the pool, *typically by flowing into the pool via a passageway or a waterfall.*”] This could not occur unless the spa water level is above the filled pool water level.

For similar reasons, applicant further submits that the newly proposed amendment, to add language that the gunite cavity into which the spa assembly is inserted is adjacent to a partially or fully in-ground pool, is described in many of the same paragraphs as the height relationship of the pool water level to the spa water level. This limitation finds written description support in the specification as filed.

IV. INDEFINITENESS REJECTION

Claims 1, 9, 14 and 22 are rejected as indefinite. The Examiner comments that claims 1, 9, 14 and 22 are unclear (indefinite) because it is not clear whether the pool is intended to be part of the claimed combination. Applicant traverses because the claims do not claim a combination. Instead, the preamble contains a statement of intended use. Applicant submits that claim 1 does not include the pool as one of the recited elements. The pool is introduced in the claim to provide spatial relation between the pool and the spa assembly, along with functional relationships. In the preamble, the spa assembly is described as being used in combination with a pool, but there is no affirmative recitation of the pool as a claim limitation following “comprising.” With respect to these claims, applicant submits that the claims are clear and definite about what is claimed and what is not claimed.

The Examiner has also found that claim 14 is unclear as to the “securing elements” limitation. Applicant traverses. Claim 11 recites securing elements as an affirmative limitation. Claim 12 de-limits claim 11 by stating that the securing elements are bolts. Claim 14 further de-limits claim 12 by describing the orientation that is used to secure the assembly to the cavity. This is not indefinite, and the rejection must be removed.

V. ANTICIPATION BY DEVANE

Claims 1, 4-7, 9 and 17-19 are rejected as anticipated by DeVane. Applicant has amended the `claims to recite a number of distinct features which individually are not present in DeVane,

nor are they present in the aggregate. First, the rejected claims have been amended to include a limitation about where the spa cavity is in relation to the pool structure. It is *adjacent* the pool structure. It is *not inside* the pool structure as is shown with DeVane. Secondly, the relationship of the spa water level to the filled pool water level is recited so that the spa water level is substantially above the filled pool water level. Again, this feature is not shown or suggested in DeVane where the spa sits *inside* the pool, at the same water level. (“The purpose of equalizer outlet 31 is to maintain the same water level in the tank 10 and pool 13. Finally, the rejected claims positively recite a spillway that is integral with but tangibly different from the flange that forms it. The spillway is formed as a negative space in the flange, allowing water to flow out of the spa and into the adjacent pool. This is different than DeVane where the rim 12 is universally the same height as the filled pool surface. There is no spillway formed in DeVane because there is no need or intention to flow water from the spa into the pool or vice versa. Finally, the claims further include the limitation that the water flows out of the spa into the pool through the spillway. This functional requirement is also missing from DeVane because water does not flow through a spillway in the way that the claim requires. Applicant believes these added limitations sufficiently distinguish the claimed invention from the prior art references, and places the application in condition for allowance.

DeVane does not disclose the present invention because DeVane fails to describe a spillway between a spa and a pool, which is integral to Applicant’s invention. Examiner has countered that there is no ‘pool’ recited as part of the combination set forth in claim 1. In response, Applicant has clarified claim 1 to include the limitation that the claimed spa assembly is “for use in combination with a pool.” Applicant believes this added distinction sufficiently distinguishes Applicant’s invention from that disclosed in DeVane. Additionally, Applicant believes there is no equivalent disclosure in DeVane. Because Applicant’s invention falls outside the scope of DeVane, DeVane is no longer a Section 102(b) reference, and claims 1, 4-7, 9 and 17-19 should be placed in condition for allowance.

VI. ANTICIPATION BY BADON JR.

Claims 1, 4-7, 9 and 17-19 are rejected as anticipated by Badon. These claims, as amended are patentable over Badon for two principle reasons. First, the claims call for a “flat upper flange” (claim 1) or a “flat upper lip” (claim 2.) Closer inspection of Badon, Fig. 1, shows

that the member 24 is not flat on both sides, but instead in the shape of an inverted J. This is because Badon's structure is meant to sit upon a deck and not be covered with decorative masonry. In contrast, the flat upper flange/lip of the present invention is in the shape of an upside down L, and is therefore flat on both sides of the "lip." This structural distinction is tied to the second reason why Badon doesn't anticipate the claims. As amended, claims 1 and 9 now include the presence of a notch in the shell portion transition region between the tub portion and the upper lip portion that is provided for purposes of installing decorative masonry. This decorative feature or intention is not shown in Badon, whose shell is intended as the final presentation.

It is telling that the Patent Examiner did not reject claims 2 or 3 or 15 in view of Badon, Jr. because these claims recited the notch limitation now added to claims 1 and 9. Although the examiner comments on page 6 that the flange of Badon, Jr. is capable of allowing masonry components to be laid thereon, the addition of the notch to claims 1 and 9 overcome this aspect of the rejection.

Applicant respectfully submits that the rejection based upon Badon, Jr. should now be removed.

V. REJECTION BASED UPON HOLCOMB AND CRAIG ET AL.

The Patent Examiner rejected claims 1, 4-14 and 17-21 under 35 U.S.C. § 103(a) as being unpatentable over Holcomb and Craig. As stated by the Examiner, Holcomb "discloses a spa assembly comprising: a shell including a tub portion 12 and a flange 13; and plumbing elements including a suction 19 and a return 18." Craig "discloses an analogous spa assembly which further includes a shell 18 having a spillway 50." Examiner contends that "it would have been obvious to one of ordinary skill in the art to associate a spillway with the Holcomb shell in order to enable installation adjacent to a swimming pool." Further, "it would have been obvious to one of ordinary skill in the spa assembly art to associate operating controls with the Holcomb spa assembly in order to facilitate operation." Finally, in light of Price, the Examiner has rejected claims 2, 3, 15, 16, 22, and 23, stating that "Price teaches one how to install appearance-enhancing tiles on a swimming pool sidewall."

Applicant reiterates that notwithstanding the titles of the cited prior art references, there is no express or implied motivation to combine the teachings of Holcomb, Craig and Price because the three disclosures describe three different systems for three different purposes. Additionally,

even if one were to combine the teachings of the three cited prior art references, the resulting product would still fall short of Applicant's invention. As a preliminary matter, however, the Examiner assumes that "a spa is mostly just a smaller version of a swimming pool." This broadly mischaracterizes the purpose of these two systems. A spa, or hot tub, is often used for resting, relaxing and warming the swimmer, whereas a swimming pool invites exercise and active recreation. Indeed, the purpose of Applicant's invention is to provide swimming pool owners the added benefit of an adjacent spa or hot tub in instances where a pool has already been, or is to be, constructed. The added plumbing, tiling and fixture properties of such a spa addition differentiate one system from the other, such that a spa and a pool are readily distinguishable. Applicant has highlighted this distinction with the amendments to claims 1, 9 and 22.

Holcomb describes a spa assembly where the shell of the spa is situated so that the spa lip rests on stakes (Holcomb col. 1, line 64), such that the upper lip of the Holcomb spa "is substantially flush with the ground surface grade 15 or level" (col. 2, lines 67-68). Craig discloses a pool/spa system formed by a "continuous, totally homogenous concrete bond," where "[t]he spa utilizes the plumbing . . . facilities of the swimming pool." (Craig, col. 2, line 35-36, col. 4, lines 9-10). Price provides a swimming pool construction method, wherein panel members are used to form the walls of the pool. (Price, col. 1, line 58 – col. 2, line 16). If one were to combine the stand-alone spa assembly in Holcomb (Holcomb col. 3, line 55 – col. 4, line 20), with the X-brace concrete support system from Craig (Fig. 6) and the wall assembly from Price (col. 1, line 50 – col. 2, line 16), the resulting structure would not be the integrated spa having the unique spillway, raised flat upper lip, gunite spa cavity and in-shell plumbing elements disclosed in Applicant's amended claims 1, 9, 22 and the rest of Applicant's application. As such, the cited prior art does not support a Section 103(a) rejection, and the subject claims should be allowed.

CONCLUSION

Applicant requests that the Examiner accept these claim amendments and approve issuance of the instant application.

Respectfully submitted,
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By:

A handwritten signature in black ink, appearing to read "Michael E. Dergosits", written over a horizontal line.

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Enclosures:

Replacement Sheets for Figs. 3, 4A, 4B, 5 and 6